



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

AUG 15 2016

**MEMORANDUM**

**SUBJECT:** Determination Regarding Request for a 18 U.S.C. § 208(b)(1) Waiver

**FROM:** Kevin S. Minoli *KSM*  
Principal Deputy General Counsel and  
Designated Agency Ethics Official

**TO:** Bill Zachmann  
Puget Sound Assistance and Interagency Agreement Project Officer  
Region 10 Puget Sound and NEP Program

I am writing in response to your request for an individual waiver pursuant to 18 U.S.C. § 208(b)(1) to allow you to extend your assignment as a Puget Sound Assistance and Interagency Agreement Project Officer in Region 10. Since April 1, 2014, you have been detailed to EPA under the Intergovernmental Personnel Act (IPA), 5 U.S.C. § 3371, *et seq.*, from your position as Senior Environmental Planner in the Department of Ecology for the State of Washington (hereinafter the "State" or "Washington"). EPA and the State mutually intend to extend your IPA from October 1, 2016 through September 30, 2017.<sup>1</sup> You now seek an individual waiver to allow you to work on particular matters that affect the State through the end of your IPA assignment. You have not previously sought nor were you advised by the Region to seek a waiver of the financial conflict of interest statute with respect to your financial interests in the State.

My staff has consulted with the Office of the Inspector General, which declined to investigate and will not take any further action, and also with the Office of Government Ethics. After careful consideration of the facts, I am granting you a limited waiver of the requirements of 18 U.S.C. § 208(b)(1) for this last extension of your IPA detail. Your appointing officials in Region 10, specifically the Puget Sound and NEP Program Manager, and the Deputy Regional Administrator, agree to this waiver.

Federal laws regarding conflicts of interest are critical to ensuring public confidence in the integrity of Agency decision making and are not swayed by personal interests. A waiver of your imputed financial interest pursuant to § 208(b)(1) should only be granted when the disqualifying financial interest is not so substantial as to be deemed likely to affect the integrity

<sup>1</sup> I understand that you have informed both parties that you intend to retire from government service in December 2016. Thus, the extension of your IPA will likely conclude at the end of calendar year 2016.



of the employee's services to the Government. Set forth below is my application of federal law to the specific facts of your request.

### **The State of Washington**

The entity with which you have a conflict of interest under 18 U.S.C. § 208(b)(1) is your employer of record, the State of Washington, one of the jurisdictions included in EPA's Region 10. EPA is responsible for maintaining and enforcing national standards under a variety of environmental laws, in consultation with state, tribal, and local governments. In carrying out its mission, EPA delegates some permitting, monitoring, and enforcement responsibility to the states and federally recognized tribes. Thus, like other states, Washington is directly regulated by EPA but also serves as a co-regulator in carrying out our environmental mandate.

### **Your Roles As They Relate to the State of Washington and the EPA**

Your position of record is Senior Environmental Planner in the State of Washington's Department of Ecology. In that position, you represented the State on Coastal Protection efforts in the Shorelands and Environmental Assistance Program that primarily helps communities manage shorelands, wetlands, and floodplains.

Since April 1, 2014, you have been detailed to EPA on an IPA assignment to manage cooperative grant agreements as a Project Officer. In that role, your primary duties include assisting with, overseeing and managing specific EPA cooperative and interagency agreements with State agencies (with the notable exception of the Department of Ecology), Puget Sound tribes and local governments, non-profit organizations and federal agencies to achieve protection and restoration of ecological health and beneficial uses of the greater Puget Sound ecosystem, with a focus on shellfish. During your detail, you have not retained any responsibilities associated with your position of record in the State.

### **The Legal Standard**

During the entirety of your IPA detail, EPA has reimbursed and will continue to reimburse 100% of your salary and benefits (currently \$~~25,000~~<sup>25,000</sup> annually) to the State, but you are not counted against the EPA employee ceiling. Individuals detailed to EPA under an IPA are considered to be employees of their home institution "for all purposes except work and supervision," see EPA's IPA Policy and Procedures Manual, p. 1-3, but are also subject to the federal ethics statutes, including 18 U.S.C. § 208, which governs financial conflicts of interest. That said, you are also deemed an "employee" for the purposes of the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, and the federal conflict of interest statutes codified at Title 18 of the United States Code. See 5 C.F.R. § 2635.102(h) [defining "employee" as including "employees of a State or local government ... serving on detail to an agency, pursuant to 5 U.S.C. § 3371, et seq."]. You are therefore prohibited from participating personally and substantially in an official capacity in particular matters in which you have a personal financial interest or in which you have an imputed interest under 18 U.S.C. § 208. The statute is intended to prevent employees from allowing personal or imputed financial



interests to affect their official actions and to protect government processes from any actual or apparent conflict of interest. The fact that you have been detailed from the State does not render this prohibition inapplicable.

Pursuant to 18 U.S.C. § 208(a), executive branch employees are prohibited from participating personally and substantially in a particular matter that will have a direct and predictable effect on their financial interests or those interests that are imputed to them.

Specifically, the statute states:

Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, ... participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be subject to the penalties set forth in section 216 of this title.

For the purposes of this provision, the financial interests of Washington are imputed to you because you are their employee of record, and your continued employment and participation in Washington's defined benefit plan are personal financial interests.<sup>2</sup> Absent a waiver from the imputed interest, you are prohibited from participating in any particular matter that affects Washington's financial interests.

18 U.S.C. § 208 provides for the possibility of obtaining a waiver of the requirements of the provision:

- (1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may

<sup>2</sup> I note that you participate in the Washington State Public Employees' Retirement System Plan 2, which is a defined benefit plan that provides full pension benefits at age 65. Pursuant to the regulatory exemptions, this personal financial interest is not a disqualifying one that raises concerns about participation in particular matters affecting the holdings of the plan or in particular matters of general applicability affecting the sponsor under the federal conflict of interest statute. See 5 C.F.R. § 2640.201(c)(1)(ii), 2640.201(c)(1)(iii) and 2640.201(c)(2).



expect from such officer or employee

You seek a waiver under this provision.

### **Your Request for a Waiver**

You seek a waiver from the financial conflict of interest statute from now until the date you retire from federal service in December 2016 or September 30, 2017 (when your IPA extension ends). This waiver will permit you to perform the responsibilities EPA and the State authorized you to perform under the terms of the IPA extension itself.

### **Application of Applicable Law to Your Request for a Waiver and Decision**

As EPA's Designated Agency Ethics Official, I am authorized to waive the criminal prohibition upon a written determination that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from you, the employee. Before I render a decision I must first, pursuant to 5 C.F.R. § 2640.303, consult with the Office of Government Ethics, where practicable, which my staff has done.

In this situation, I conclude that your employment status with the State does present an imputed financial conflict of interest of the sort prohibited by 18 U.S.C. § 208, absent a waiver or applicable regulatory exemption. The statute's prohibitions are not absolute, however, and specifically authorize an agency official to waive those prohibitions in certain limited circumstances. At EPA, I am the Designated Agency Ethics Official and, as such, have the authority to grant such a waiver.

Having applied the applicable law and Office of Government Ethics guidance to the facts of this case, I have concluded that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from you from now until September 30, 2017 and therefore grant you a waiver from the prohibitions contained in 18 U.S.C. § 208 during that time period.

### **Legal Analysis**

As articulated in the statute itself and in guidance from the Office of Government Ethics, the key determination for a deciding official is whether the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from the employee. In applying the factors articulated by the Office of Government Ethics at 5 C.F.R. § 2640.301(b), I find that:

- You and the State of Washington are the "persons" whose financial interests are involved;
- You are currently on an IPA assignment from Washington although EPA reimburses Washington for your salary and benefits;
- The disqualifying imputed financial interest arises from your employment status with



- Washington, which raises the potential for gain or loss for the State as a result of government action that you may participate in as part of your EPA duties;
- The disqualifying personal financial interest arises from your employment status with Washington and your continued participation in the State's defined benefit plan, which are of substantial financial interest to you;
  - Your position as Puget Sound Assistance and Interagency Agreement Project Officer involves your personal and substantial participation in particular matters that involve Washington specifically, including decisions or recommendations about grants and other specific party matters;
  - Washington is directly regulated by EPA but also serves as a co-regulator in carrying out EPA's environmental mandate;
  - Both EPA and Washington specifically assigned you to work on Puget Sound issues that include that State; but
  - You will not work on or be assigned to work on any particular matters that involve your specific agency, the State of Washington's Department of Ecology; and
  - You will not be assigned to serve as a project officer on any cooperative agreements or grants with that agency.

I have considered these factors carefully, as well as the fact that your participation in particular matters that involve the State as a specific party are not likely to affect your employment with the State or the ability or willingness of the State to meet its commitments to you under its defined benefit plan. Under the statute, then, the only remaining question is whether the interest "is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee." In considering this aspect of the statutory test, the fact that you are on an IPA detail is particularly relevant.

By signing the IPA agreement, EPA and the State both assigned you to work on Puget Sound-related issues that include the State. The "integrity of the services" that the State and EPA expect from you in your current position is to fulfill your duties to the best of your ability to benefit both organizations. Frankly, when approving your IPA, the State recognized that your EPA scope of work may entail working directly on particular matters that involved it but placed no parameters on your ability to represent EPA's interests over theirs. There was no limit on the performance of those duties even if those duties were not fully aligned with the interests of the State on a particular matter.

In passing the IPA, Congress clearly intended for an exchange of personnel and expertise between federal government and other entities, including states. To refuse to consider a waiver at all, or to dramatically limit one, would seem to defeat that intention. I therefore conclude that your imputed financial interest in the State is not likely to affect the integrity of the services that the United States Government and EPA expect from you, so I am granting this limited waiver.

### **Conclusion**

Based on the factual circumstances of this request, including the expectations of the State and EPA that you are performing work to benefit both organizations, and the limited nature of

the request, I hereby grant the request for a waiver under 18 U.S.C. § 208(b)(1).

This waiver is limited in nature and permits only your official participation in particular matters that arise in Region 10 that you would be participating in as part of your assigned duties as the Puget Sound Assistance and Interagency Agreement Project Officer. You will not work on any particular matters, including specific party matters, that involve your specific agency, the State of Washington's Department of Ecology. This restriction extends to serving as a project officer on any cooperative agreements or grants with that agency. However, you may work on particular matters that involve the other agencies of the State, even as specific party matters, because I have determined that doing so is not likely to affect your employment with the State or the ability or willingness of the State to meet its commitments under its defined benefit plan. Further, this waiver is not retroactive and does not apply to your participation in any particular matters before the date this waiver is signed. See 5 C.F.R. § 2640.301(a)(5). This waiver will cease to be effective on September 30, 2017.

You understand that you remain a federal employee while on the IPA assignment, subject to the Standards of Ethical Conduct for Executive Branch Employees, 5 C.F.R. Part 2635, and the criminal conflict of interest statutes, 18 U.S.C. §§ 203, 205, 207, 208, and 209, as well as other applicable laws. If you have questions about whether a certain matter is covered by this waiver, or whether an action you may take while on detail implicates the ethics laws, you are directed to promptly seek assistance from Justina Fugh, Senior Counsel for Ethics, or me.

Finally, pursuant to 5 C.F.R. § 2640.304, a copy of this waiver will be made available upon request to the public in accordance with the procedures described in 5 C.F.R. § 2634.603. In making this waiver publicly available, certain information may be withheld in accordance with 5 C.F.R. § 2640.304 and 5 U.S.C. § 552.

cc: Michelle Pirzadeh, Deputy Regional Administrator, Region 10  
Justina Fugh, Senior Counsel for Ethics  
Socorro Rodriguez, Regional Ethics Counsel, Region 10  
Garth Wright, Regional Ethics Counsel, Region 10